

## Alternative causation in asbestos cases under Belgian law

1. [1141] The English and Wales Court of Appeal's decision deals with an individual who died of lung cancer caused by an exposure to asbestos while being employed successively by six different companies. Experts cannot establish which (if any) of the exposures triggered the cell changes in his body which led to the contraction of the disease. For the first time, the Court of Appeal applies the so-called *Fairchild* exception (*Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32) in a lung cancer case. This means that damages are awarded against each employer in proportion to the increase in risk for which each was responsible.

This decision offers a typical example of alternative causation, where multiple independent defendants may have caused the plaintiff's harm, but less than all (or just one defendant) actually caused it.<sup>1</sup> Alternative causation cases are exceptional in Belgian law, the decision therefore offers an invitation to discuss the issue. First, from a Belgian perspective, it is remarkable that the English and Wales Court of Appeal does not apply the *conditio sine qua non* test, but falls back on another test (*i.e.* the *Fairchild* exception) which limits the liability of the employers to the extent of the exposure they generated. Second, civil liability actions because of asbestos exposure are also very rare in Belgium, because of the elaborate system of compensation funds.

In the following commentary, I will pay attention to these two main differences, setting forth the current Belgian state of the art. The first section focuses on the civil liability approach of alternative causation in general and asbestos cases in particular. The second section examines two compensation funds which are playing a prominent role in this field: the Fund for occupational diseases and the Asbestos fund.

### 1. CIVIL LIABILITY

#### 1.1. Prevalence of the *conditio sine qua non*-test

2. In Belgian law, according to art. 1382 of the Civil Code, an injured party obtains full compensation if it proves that the basic conditions for liability are met (fault, damage and causation). This follows from the general principles concerning the [1142] burden of proof (art. 1315 Civil Code and 870 Judicial Code), which determine that each party has to establish those elements that constitute the basis of their claim.

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\* W. VANDENBUSSCHE, 'Alternative causation in asbestos cases under Belgian law', ERPL (European Review of Private Law), no. 6, 2018, 1141-1152.

<sup>1</sup> I. GILEAD, M.D. GREEN & B.A. KOCH, 'General Report' in I. GILEAD, M.D. GREEN & B.A. KOCH (eds.), *Proportional Liability. Analytical and Comparative Perspectives* (Berlin: De Gruyter 2013), p (1) at 12, no. 33.

With regard to causation, an injured party has to establish a certain causal link between the fault and the damage.<sup>2</sup> To assess the causal link, Belgian courts make use of a ‘but for’ or ‘*conditio sine qua non*’ test. The key question is whether the fault was a condition without which the damage would not have occurred.<sup>3</sup> Consequently, an injured party has to demonstrate that in the absence of the fault, the damage would not have occurred in the way it did.<sup>4</sup> Once the *conditio sine qua non*-link is established, Belgian courts apply the equivalence theory. This implies that all the causes are considered equal. It makes no difference whether a cause is direct or indirect, normal or abnormal, foreseeable or unforeseeable.<sup>5</sup>

Besides it is important to shed a light on the required level of certainty. According to the Court of Cassation, a judge cannot award any damages “*in case he decides that the causal link between fault and damage remains uncertain*”.<sup>6</sup> Nonetheless, the cause-and-effect relationship should not be established empirically or scientifically. It is sufficient that an injured party satisfies the standards of a judicial certainty. This means that a judge can accept causation with a likeliness bordering on certainty, which prevents him from taking other options seriously into account, although these options remain theoretically possible.<sup>7</sup>

[1143] It goes without saying that the establishment of a certain causal link is the most difficult hurdle to overcome in asbestos cases. In particular, it is very hard - if not impossible - to prove which exposure during which period of employment was the actual cause or *conditio sine qua non* of the damage.<sup>8</sup> This difficulty to identify the real cause of the damage is not limited to asbestos cases, but also rises in pollution cases or major traffic accidents.<sup>9</sup> In all those cases, it is uncertain which member of a group of potential tortfeasors actually caused the harm.

**3.** Contrary to the English and Wales Court of Appeal, Belgian courts refuse to abandon the *conditio sine qua non* requirement in alternative causation cases. As a result, if the

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<sup>2</sup> I. DURANT, ‘À propos de ce lien qui doit unir la faute au dommage’ in B. DUBUISSON & P. HENRY (eds) *Droit de la responsabilité. Morceaux choisis* (Brussel: Larcier 2004), p (7) at 29, no. 13; J.-L. FAGNART, *La causalité* (Waterloo: Kluwer 2009), p. 87, no. 180; M. VAN QUICKENBORNE, *Oorzakelijk verband tussen onrechtmatige daad en schade* (Mechelen: Kluwer 2007), p 61, no. 69; T. VANSWEEVELT & B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht* (Antwerpen: Intersentia 2009), p 801, no. 1268.

<sup>3</sup> C. VAN DAM, *European Tort Law*, Oxford, Oxford University Press, 2006, p 268, no. 1102.

<sup>4</sup> Cass. 6 december 2013, C.10.0245.F, jure.juridat.just.fgov.be/pdfapp/download\_blob?idpdf=N-20131206-8; Cass. 23 september 2013, C.12.0559.N, jure.juridat.just.fgov.be/pdfapp/download\_blob?idpdf=N-20130923-2; Cass. 31 mei 2013, C.12.0399.N, jure.juridat.just.fgov.be/pdfapp/download\_blob?idpdf=N-20130531-4.

<sup>5</sup> J.-L. FAGNART, *La causalité*, 22, no. 46; S. STIJNS, *Verbintenissenrecht*, Ibis (Brugge: die Keure 2013) 109, no. 138; T. VANSWEEVELT & B. WEYTS, *Handboek*, 765, no. 1224.

<sup>6</sup> Cass. 6 december 2013, C.10.0245.F, jure.juridat.just.fgov.be/pdfapp/download\_blob?idpdf=N-20131206-8; Cass. 26 juni 2008, C.07.0272.N, jure.juridat.just.fgov.be/pdfapp/download\_blob?idpdf=N-20080626-10; Cass. 12 oktober 2005, P.05.0262.F, jure.juridat.just.fgov.be/pdfapp/download\_blob?idpdf=N-20051012-15.

<sup>7</sup> H. BOCKEN, I. BOONE & M. KRUIHOF, *Inleiding tot het schadevergoedingsrecht. Buitencontractueel aansprakelijkheidsrecht en andere schadevergoedingsstelsels* (Brugge: die Keure 2014), p 47, no. 71; I. DURANT, in *Droit de la responsabilité*, p 27, no. 12; M. VAN QUICKENBORNE, *Oorzakelijk verband*, p 62, no. 69.

<sup>8</sup> M. HOPPENBROUWERS, *Chemical liability in risk society: A comparative quest for an optimal approach of complex causation in toxic tort* (Hasselt: UHasselt doctoral dissertation 2014), p 226.

<sup>9</sup> I. GEERS, ‘Alternative Liability Under Belgian Law: Unknown and Thus Unloved?’, *ERPL* (European Review of Private Law) 1994, p (442) at 440.

damage is due to an unidentified member of a group, an injured party will normally fail to prove a causal link between a specific fault of a group-member and its own damage.<sup>10</sup> This leads to the unsatisfactory result that a victim will receive no compensation and a potential wrongdoer will be absolved from liability.<sup>11</sup> This outcome even jeopardizes an elementary sense of justice, especially when it is established that a defendant acted tortuously and its conduct may have been the actual cause of plaintiff's harm. Therefore, different techniques have been developed to soften the requirement of proving cause.

## **1.2. Multiplicity of techniques**

4. The current techniques which are put in place to meet evidentiary difficulties of victims, are very diverse and fragmented. Some solutions are based on legislation (1.2.1), others are created by case law on the basis of substantive law (1.2.2) or on the law of evidence (1.2.3). None of these techniques have a general scope. Their applicability differs from case to case. There is therefore little chance that the following solutions may be useful to solve the issue of asbestos exposure in case of a plurality of potential causes.

### **1.2.1. Statutory provisions**

5. First, the *conditio sine qua non* hurdle can be overcome by making use of vicarious liability. Art. 1384 Civil Code determines that a person can be held liable for damage caused by things under his custody (first para.), by his minor children (second para.), by his servants (third para.) or by students under his [1144] supervision (fourth para.). On the basis of this provision, a judge can attribute liability to a custodian, parent, principal or teacher without identifying the person who actually committed the wrongful act.<sup>12</sup>

For example, a fire broke out at the premises of a company in a room where employees were allowed to smoke. The employer was held liable for the damage, although the actual employee which caused the fire outbreak was unknown. The Court of Cassation dismisses the employer's appeal. As all potential perpetrators were employees of the company, it was not necessary to identify the actual author.<sup>13</sup>

6. Second, an amendment of the law of 22 august 2002 introduced a specific liability regime for multiple collisions. When several vehicles are involved in a traffic accident and it is not possible to identify which vehicle was responsible for the accident, the compensation awarded to the injured party will be equally distributed among the insurers that cover the civil liability of the drivers of those involved vehicles, unless one can prove that its liability

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<sup>10</sup> I. GEERS, *ERPL* 1994, p 442.

<sup>11</sup> T. VANSWEEVELT & B. WEYTS, *Handboek*, 818, no. 1289; D. VERHOEVEN, 'De DES-slachtoffers en het Belgische aansprakelijkheidsrecht. Een confrontatie met verjaring, het foutbegrip, onzekere toekomstige schade en alternatieve causaliteit', *T. Gez.* (Tijdschrift voor Gezondheidsrecht) 2013, p 165, no. 56.

<sup>12</sup> R.O. DALCQ, *Traité de la responsabilité civile: Le lien de causalité*, II (Brussel: Larcier 1962), p 137, no. 2461; J.-L. FAGNART, *La causalité*, 219, no. 427; T. VANSWEEVELT & B. WEYTS, *Handboek*, p 812, no. 1283.

<sup>13</sup> Cass. 8 april 1965, *Pas.* 1965, I, p 847 = *RW* 1965-66, p 1349.

is certainly not involved (art. 19a-11, § 2 Motor Insurance Liability Act of 21 November 1989).<sup>14</sup>

This rule is unique in Belgian law. It adopts some kind of joint and several liability, accompanied by a shift in the burden of proof. Although it is not literally stated in the law, it is generally accepted that the victim can address each of the insurers for the entire harm. Between themselves, the insurers will contribute in equal shares to the compensation.<sup>15</sup> Unlike other joint and several liability regimes, art. 19a-11, § 2 does not impose on potential tortfeasors, but directly on their insurers to redress the damage. An insurer can only be exempted from this obligation if he proves with a sufficient level of certainty that the driver of the vehicle he insures is not liable.

### 1.2.2. Judicial techniques

7. A first judicial technique to overcome causal uncertainty is to consider a group of potential tortfeasors to have been acting in concert. This presupposes an express or tacit pact between the members of a group to pursue a common plan or design to commit a tortious act. In that case, all participants are held jointly and severally [1145] liable for the damage resulting from their joint action. As a result, there is no need to identify the actual tortfeasor(s) anymore.<sup>16</sup>

For example, four children are taking part in a dangerous game. They are throwing stones to each other. A five year old boy, who is running away from this activity, gets hit in the eye. The four children deny having thrown the fatal stone and the boy cannot prove who is lying. The Court of First Instance, however, considers that all the children were taking part in this dangerous and illegitimate game. The actual cause of the accident was not the individual harmful act by one of the players, but their joint participation in this dangerous activity. Therefore, they are jointly and severally liable for the damages.<sup>17</sup>

In this case, proof to the contrary that an individual group member did not cause the damage, is irrelevant.<sup>18</sup> It is not the causal relationship between each individual fault and the damage which is taken into account, but the one between the collective fault and the damage. In fact, the evaluation of the wrongfulness is shifted to an earlier point in time, to

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<sup>14</sup> Wet 21 november 1989 betreffende de verplichte aansprakelijkheidsverzekering inzake motorrijtuigen, *BS* 8 december 1989, 20.122.

<sup>15</sup> J. AMANKWAH, 'De automatische vergoedingsregeling van art. 19bis-11, § 2 WAM-wet', *RW* (Rechtskundig Weekblad) 2016-17, p 91; G. JOCQUÉ, 'Het mysterie van artikel 19bis-11, par. 2 W.A.M. 1989', *TPR* (Tijdschrift voor Privaatrecht) 2004, p 364, no. 15; p 262; S. VERECKEN, 'Kettingbotsing tussen het Gemeenschappelijk Motorwaarborgfonds en WAM-verzekeraars in artikel 19bis-11 WAM' in I. BOONE, I. CLAEYS & L. LAVRYSEN, *Liber Amicorum Hubert Bocken* (Brugge: die Keure 2009), p (247) at 262.

<sup>16</sup> H. BOCKEN, I. BOONE & M. KRUIHOF, *Inleiding tot het schadevergoedingsrecht*, p 71, no. 107; I. GEERS, *ERPL* 1994, p 446, no. 7; M. HOPPENBROUWERS, *Chemical liability in risk society*, p 239.

<sup>17</sup> Rb. Turnhout 11 februari 1980, *Pas.* 1980, III, p 40. See also Luik 7 november 1980, *Jur.Liège* 1981, p 7.

<sup>18</sup> H. BOCKEN, I. BOONE & M. KRUIHOF, *Inleiding tot het schadevergoedingsrecht*, p 71, no. 107; I. GEERS, *ERPL* 1994, p 446, no. 7. *Contra*: M. HOPPENBROUWERS, *Chemical liability in risk society*, p. 239: 'each group member is allowed to prove his innocence and will then escape liability'.

the moment one decides to take part in a joint action. Hence, a potential tortfeasor can only escape from liability by demonstrating that he was not part of the group.<sup>19</sup>

**8.** Closely related to the previous technique, is the assumption of an organisational mistake. Instead of focusing on the tortious act of an unknown member of a group, the judge attributes liability to the organiser of a harmful activity.<sup>20</sup> For example, a professional association of pharmacists calls a strike and organizes a protest. During this event, a non-participating pharmacy is seriously damaged by an attack with methylene blue. The individual author of the damage could not be detected. Nonetheless, the justice of peace holds the association liable, because it incited its members “*to take-up-the-hatchet with bluing*”.<sup>21</sup>

It is clear that this technique, just as the previous one, can be helpful to attribute liability in case of joint action of a group. It does not however bring any relief when several potential wrongdoers are unrelated to each other, such as in the asbestos case under comment.<sup>22</sup> [1146]

### 1.2.3. Evidentiary mechanisms

**9.** Judges are also endowed with a number of evidentiary mechanisms to overcome causal uncertainty. Presumptions of fact are the most important category. According to art. 1349 of the Belgian Civil code, a presumption is a method of legal reasoning whereby one fact that is not proven (an ‘unknown’ fact) is inferred from another fact that has been proven (a ‘known’ fact). A judge can rely on an infinity of facts or documents as the basis of such a presumption. Besides he is free to adopt this reasoning by induction in any specific case. Therefore, presumptions constitute an important method of establishing facts which cannot be proven in a direct way. Presumptions can provide for a solution in cases which tend to alternative causation, where the number of potential tortfeasors is limited and the circumstances are pointing at one of them as the supposed responsible.<sup>23</sup>

For example, a house situated near two stone quarries, was hit by stones, which were hurled away due to explosions. The judge dismisses the joint and several liability of both companies, because the stones that actually damaged the house could only originate from one single quarry. The victim could not demonstrate which quarry was responsible. Based on all the circumstances of the case, the court assumes a presumption of fact that the damage was caused by the quarry immediately beside the house.<sup>24</sup>

**10.** A second mechanism is the judicial reversal of the burden of proof. Belgian law traditionally takes a rather adverse stance towards this mechanism, because it contradicts

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<sup>19</sup> I. GEERS, *ERPL* 1994, p 446, no. 7; M. VAN QUICKENBORNE, *De oorzakelijkheid in het recht van de burgerlijke aansprakelijkheid* (Brussel: Elsevier 1972), p. 171-172, no. 297-300.

<sup>20</sup> R.O. DALCQ, *Traité de la responsabilité civile*, II, p 136, no. 2459; T. VANSWEEVELT & B. WEYTS, *Handboek*, p 812, no. 1283.

<sup>21</sup> Vred. Antwerpen 26 oktober 1981, *RW* 1982-83, p 2483.

<sup>22</sup> H. BOCKEN, I. BOONE & M. KRUIHOF, *Inleiding tot het schadevergoedingsrecht*, p 71, no. 107.

<sup>23</sup> I. GEERS, *ERPL* 1994, p 448, no. 11.

<sup>24</sup> Brussel 23 december 1927, *RGAR* 1928, n° 227.

the principles concerning the burden of proof (art. 1315 Civil Code and 870 Judicial Code). Nonetheless, very occasionally, courts (un)consciously apply such a reversal of the burden of proof, even in alternative causation cases.

For example, the Court of appeal of Liège applied this sort of reasoning in a case about a traffic accident. A road user was first run over by a negligent car driver and afterwards, lying on the road, his body was hit again by a second car. The court decides that the car drivers can only be exempted from liability, if they succeed to prove that their acts did not cause the death of the road user.<sup>25</sup> Whereas, in principle, the victim or his successors need to establish a *condition sine qua non*-link between the negligence of both drivers and the damage. This case, however, was not based on civil liability, but on criminal liability for involuntary manslaughter. [1147]

## 2. COMPENSATION FUNDS

11. The primary goal of compensation funds is to ascertain victims compensation without establishing liability.<sup>26</sup> These funds have been created in areas where victims are confronted with structural difficulties to obtain compensation (e.g. because of the anonymity or insolvency of the wrongdoer or because of the large number of potential tortfeasors). With regard to asbestos cases, two compensation funds are playing a prominent role in Belgium: the Fund for occupational diseases (since 16 August 2015 the Federal agency for occupational risks) and the Asbestos fund.

As of 1970, employees and civil servants can turn to the Fund for occupational diseases to obtain compensation for damage resulting from asbestos exposure. This system is even mandatory for this type of victims, as Belgian law excludes civil liability claims from employees against employers for occupational diseases. This explains also the lack of similar cases as the decision under comment in Belgium. As of 1 April 2007, another compensation scheme has been put in place: the Asbestos fund. This fund has a broader scope and processes claims of all victims who contracted asbestosis and mesothelioma from occupational and environmental exposures. Environmental victims can choose between applying to this fund or filing an action in court. However, once they received payment of the fund, they cannot take any legal action against the responsible company.

### 2.1. *Fund for occupational diseases*

12. The Fund for occupational diseases was set up by the Coordinated Laws of 3 June 1970 concerning the prevention of occupational diseases and the compensation for the damage resulting from such diseases (hereafter: the Law for Occupational Diseases). The law of 16 August 2016 merged this Fund with the Fund for occupational accidents into the Federal agency for occupational risks (hereafter: Fedris).

13. For former employees of asbestos manufacturing companies or individuals employed in asbestos-rich environments, an allowance paid by Fedris is the only way to receive

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<sup>25</sup> Luik 1 maart 1966, *RGAR* 1966, n° 7728.

<sup>26</sup> H. BOCKEN, I. BOONE & M. KRUIJTHOF, *Inleiding tot het schadevergoedingsrecht*, p 257, no. 415; I. BOONE, *Verhaal van derde betalende op de aansprakelijke* (Antwerpen: Intersentia 2009) p 27, no. 22.

compensation. This compensation scheme excludes civil liability claims against the employer and co-workers, except in cases of wilful misconduct (art. 51 of the Law for Occupational Diseases).<sup>27</sup> This exclusion results from a historic compromise between employers and employees to organize an automatic, albeit limited, compensation for those who contracted a disease in a professional [1148] context.<sup>28</sup> Legal doctrine criticizes the exclusion, because it reduces the protection of those who have incurred the highest risk of exposure.<sup>29</sup> The only way out is to demonstrate a wilful misconduct. The few cases that were filed before the Belgian courts however foundered on this heavy burden of proof.<sup>30</sup>

14. In general, there are two types of diseases which can be qualified as an occupational disease. A first category consists of occupational diseases which are referred to in a list published in a Royal Decree.<sup>31</sup> Asbestosis and mesothelioma appear on this list. A victim is entitled to a payment by Fedris if he produces a double proof: the contraction of a disease referred to in the list and the exposure to an occupational hazard during his work (art. 30 of the Law for Occupational Diseases). With regard to this exposure, it is required that it is inherent to the professional practice, that it occurs more frequently in the group of persons the victim belongs to than in public at large and that it constitutes, according to the state of the art of the medical science, a predominant cause of the disease (art. 32, par. 2 of the Law for Occupational Diseases).

Second, according to art. 30bis of that same law, diseases that are not referred to in the list can also give rise to compensation, on the condition that this disease is decisively and directly linked to the professional practice. The burden of proof of this causal relationship is lying on the victim or its dependents. In the light of the Court of Appeal's decision under comment, it is important to observe that this type of occupational diseases provides victims of asbestos-related lung cancer a view on redress.<sup>32</sup> In that perspective, a decision of the Belgian Court of Cassation of 2 February 1998 is worth mentioning, as the Court decides that the requirement of a decisive and direct link in art. 30bis does not imply that the occupational risk should be the single or predominant cause of the disease.<sup>33</sup> Between 1992

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<sup>27</sup> Is also considered as wilful misconduct, a situation in which the employer does not abide by his obligations concerning safety at work and hygiene after a written warning notice of the social inspection. (art. 51, § 1, para. 1 of the Law for Occupational Diseases).

<sup>28</sup> G. PROVOOST, 'Aansprakelijkheid en vergoeding van asbestgerelateerde gezondheidsschade', *Soc.Kron.* (Sociale Kronieken) 2013, p 501.

<sup>29</sup> I. BOONE, *Verhaal van derde betalers op de aansprakelijke*, p 158, no. 160; G. PROVOOST, *Soc.Kron.* 2013, p 501; V. VERVLIET, *Buitencontractuele aansprakelijkheid bij professionele risico's* (Antwerpen: Intersentia 2007), p 250, no. 346.

<sup>30</sup> Brussel 2 november 1998, AR 1988/4253, *onuitg*; Rb. Brussel 1 oktober 1997, AR 96/7741/A, *onuitg*.

<sup>31</sup> Royal Decree of 6 February 2007 establishing the list of industries, occupations or categories of enterprises which is suspected by an occupational disease have been exposed to the risk of this disease to be, *Royal Gazette* 15 July 1969.

<sup>32</sup> V. VERVLIET, *Buitencontractuele aansprakelijkheid bij professionele risico's*, p 249, no. 34; J. VAN LANGENDONCK, A. VAN REGENMORTEL & Y. STEVENS, *Handboek socialezekerheidsrecht* (Antwerpen: Intersentia 2015), p. 319, no. 902.

<sup>33</sup> Cass. 2 februari 1998, S.97.0109.N, *Arr.Cass.* 1998, 147 = *Bull.* 1998, 156 = *BTSZ* 1999, 597, noot D. DE BRUCQ = *JTT* 1998, 409 = *RW* 1998-99, 1250 = *Soc.Kron.* 1998 527, noot.

and 2001, [1149] the number of lung cancers which were recognized by the Fund for occupational diseases as asbestos-related diseases amounted to 159.<sup>34</sup>

## 2.2. *Asbestos fund*

15. The Indemnification Fund for Asbestos Victims (hereafter: the Asbestos fund) is introduced by the Program Law (I) of 27 December 2006. It operates within the framework of Fedris. It is intended for all victims of asbestos exposure “*irrespective of their occupational capacity*”. In principle, everyone may apply, whether one is a civil servant, a self-employed, an employee or a person affected by the environment.<sup>35</sup>

The Asbestos fund covers two kinds of illnesses which can only be caused by an exposure to asbestos: asbestosis and mesothelioma. Except for applicants affected with mesothelioma, an applicant must prove that the criteria of asbestos exposure or the diagnostic criteria as defined by Fedris are met (art. 119, par. 2 of the Program Law). The administration of evidence may sometimes be very hard. After all, taking into account the long incubation period (20 to 40 years), all evidence may have disappeared.<sup>36</sup>

16. With regard to the amount of damages, scholars claim that allowances of the Asbestos fund are relatively low, considerably lower than any indemnification that would be awarded on the basis of civil liability.<sup>37</sup> Even so, art. 125, para. 1 of the Program Law prohibits recipients of payments to bring any legal action against the responsible company (or its employees or agents) in order to obtain full compensation. In other words, victims must renounce to their legal right to sue the responsible person in order to receive a payment from the fund. By doing so, the Asbestos fund broadens the civil immunity of employers and self-employed, on the condition that they are financially contributing to Fedris.<sup>38</sup> Only very exceptionally, victims decide to bring a case before the court against an asbestos manufacturer.

One case about a Belgian family that did not apply to the asbestos fund, but filed a lawsuit against an asbestos manufacturing company (Eternit), received a lot of media attention. The case was initiated in 2000 by the mother of the family, who died a few months later of mesothelioma. Her illness was caused by exposure to asbestos on the contaminated work clothes of her husband, who worked at Eternit, and by environmental exposure from that same factory. After her death, her [1150] children continued the lawsuit. On 28 November 2011, the Court of first instance of Brussels awarded a sum of € 250 000 to the family members for economic and non-economic losses.<sup>39</sup> On 29 March 2017, the Court of Appeal of Brussels confirms this judgement, but reduced the amount of compensation to € 25 000.

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<sup>34</sup> [www.gezondheid.be/index.cfm?fuseaction=art&art\\_id=4203](http://www.gezondheid.be/index.cfm?fuseaction=art&art_id=4203).

<sup>35</sup> Verslag bij wetsvoorstel tot oprichting van een Schadeloosstellingfonds voor asbestslachtoffers, *Parl. St. Kamer* 2006-07, nr.2773/025, 60.

<sup>36</sup> B. MARTENS, ‘Het schadeloosstellingsfonds voor asbestslachtoffers’ in K. DE KETELAERE, *Jaarboek Milieurecht 2005-06* (Brugge: die Keure 2007), 29-52.

<sup>37</sup> H. BOCKEN, I. BOONE & M. KRUIHOF, *Inleiding tot het schadevergoedingsrecht*, p 257, no. 415

<sup>38</sup> I. BOONE, *Verhaal van derde betalers op de aansprakelijke* (Antwerpen: Intersentia 2009), p 158, no. 158.

<sup>39</sup> Rb. Brussel 28 november 2011, *Amén.* 2012, 192 = *Juristenkrant* 2011, afl. 239, 3 = *MER* 2012, 166, noot K. DECOCK & S. RONSE = *RABG* 2012, 1064, noot = *TMR* 2012, 167.



According to the Court, Eternit was aware of the health dangers of asbestos and had tortuously failed to take on time precautionary measures to protect the families of its employees and people living in the neighbourhood of the manufactory. With regard to causation, it determines that the wrongfulness of Eternit stands in causal relationship to the contraction of mesothelioma.<sup>40</sup>

17. With regard to the scope of the Asbestos fund, it is important to note that lung cancer is excluded, as this disease is not mono-causally linked to asbestos exposure. Just like laryngeal cancer, this disease may have been caused by other agents than or besides asbestos (e.g. smoking). Although art. 118, para. 3 of the program law stipulates that a Royal Decree could expand the scope towards every ‘*disease for which an exposure to asbestos is a decisive factor*’, the government has not yet taken this step, notwithstanding some recommendations from legal scholarship in that direction.<sup>41</sup>

As mentioned above, employees and civil servants who contracted lung cancer as a result of asbestos exposure, may apply to Fedris if they meet the strict criteria. Other victims of asbestos exposure find themselves in an extremely vulnerable position. They can file an action for civil liability against the potential wrongdoers, but these claims have only a limited chance on success. This is due to practical reasons (e.g. the long incubation period, a variety of potential causes of lung cancer: asbestos, smoking, air pollution, fine particles) and legal grounds (e.g. prescription).

18. A final observation is that an allowance of the Asbestos fund for victims of mesothelioma may be cumulated with any other benefit granted under Belgian or foreign legislation (art. 121, par. 1 of the Program Law). An intervention of the Asbestos fund in favor of the victims of asbestosis, however, is subject to a fixed reduction if the victim already enjoys a compensation for the same illness (art. 121, par. 2 of the Program Law). For example, an employee who already obtained a compensation from Fedris, will receive a decreased benefit.

## CONCLUSION

19. Whereas the Court of Appeal comes to a balanced solution on the basis of a different causation test (*i.e.* the *Fairchild* exception), Belgian courts refuse to [1152] renounce the *condition sine qua non*-test in alternative causation cases. It is, however, almost impossible for a victim to demonstrate which exposure during which period of employment was the actual cause of his damage. Moreover, when victims are employees or civil servants, the civil liability road is even cut off. Those victims can only turn to Fedris, the Federal Agency for occupational risks, in order to obtain an allowance. Fedris can recognise lung cancer as an occupational disease, on the condition that the victim proves that the cancer is decisively and directly linked to his professional practice.

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<sup>40</sup> Brussel 28 maart 2017, *Juristenkrant* 2017, afl. 347, 2-3.

<sup>41</sup> E. DE KEZEL, *Asbest, gezondheid en veiligheid: ontwikkelingen in het aansprakelijkheidsrecht* (Antwerpen: Intersentia 2013), 528, no. 1141; E. DE KEZEL, ‘Blootstelling aan asbest. Civiele vorderingsmogelijkheden van milieuslachtoffers’, *TMR (Tijdschrift voor Milieurecht)* 2008, p 598.